Supreme Court, U.S.
FILED
MAY - 7 2004
OFFICE OF THE CLERK

No. 03-0315

IN THE

Supreme Court of the United States

ALBERT DURRUTHY,

Petitioner,

v.

OFFICER JENNIFER PASTOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARC A. WITES
WITES, KAPETAN & FRIEDLAND, P.A.
1701 West Hillsboro Boulevard
Suite 305
Deerfield Beach, FL 33441
(954) 570-8989

Counsel for Petitioner

187326

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether the Eleventh Circuit Failed to Follow *Hope v. Pelzer*, 536 U.S. 730 (2002)?

II. Whether the Eleventh Circuit Exceeded its Jurisdiction by Reevaluating the Sufficiency of the Evidence in a Qualified Immunity Case?

LIST OF PARTIES

Officer Jennifer Pastor is the only Respondent. The City of Miami is being served as an interested party.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	vii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
I. THE ELEVENTH CIRCUIT FAILED TO FOLLOW *HOPE v. PELZER*, 536 U.S. 730 (2002).	5
A. Mr. Durruthy's right to not be improperly arrested, under the facts and circumstances in this case, was clearly established.	6

Contents

Page

B. Mr. Durruthy's right to not be subject to excessive force, under the totality of the circumstances, was clearly established. 9

II. THE ELEVENTH CIRCUIT EXCEEDED ITS JURISDICTIONAL LIMITATIONS. 12

CONCLUSION 17

TABLE OF CITED AUTHORITIES

Cases *Page*

Graham v. Conner, 490 U.S. 386 (1989) 11

Holmes v. Kucynda, 321 F.3d 1069 (11th Cir. 2003) 7

Hope v. Pelzer, 536 U.S. 730 (2002) ..... *passim*

Johnson v. Jones, 115 S. Ct. 2151 (1995) ...5, 13, 14, 15

Lee v. Ferraro, 284 F.3d 1188 (2002) 11, 13, 15

Priester v. City of Riviera Beach, 208 F. 3d 919 (11th Cir. 2000) 13

Sheth v. Webster, 145 F. 2d 1231 (11th Cir. 1998) .. 13

Skritch v. Thornton, 280 F.3d 1295 (11th Cir. 2002) 13

Smith v. Mattox, 127 F.3d 1416 (11th Cir. 1997) ... 11

Thornton v. City of Macon, 132 F.3d 1395 (11th Cir. 1998) 10, 13

Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002) .. 6

Cited Authorities

Page

Statutes and Laws

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 1, 2

CITY OF MIAMI OFFICE BULLETIN, #00-4, January 14, 2000 8

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated November 26, 2003 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of Florida, Miami Division Dated December 13, 2002 ..... 37a

Appendix C — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Filed February 10, 2004 ..... 54a

Petitioner Albert Durruthy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 351 F.3d 1080. (App. A) The opinion of the District Court is reported at 235 F. Supp.2d 1291. (App. B)

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on November 26, 2003. The petition for rehearing and for rehearing en banc was denied on February 10, 2004. (App. C) This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983, Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory

decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Fourth Amendment to the Constitution of the United States provides that people have the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This petition seeks review of a civil rights case wherein the violent arrest of a television cameraman engaged in newsgathering was captured on videotape. The Eleventh Court, over the dissent of visiting Judge Norman H. Stahl of the United States Court of Appeals for the First Circuit, reversed the Federal District Court's denial of qualified immunity to Respondent Officer Jennifer Pastor. The action was properly before the Federal District Court based on the inclusion of a 42 U.S.C. § 1983 claim in the original cause of action.

As displayed on the videotape of his arrest, Mr. Durruthy entered a cleared and secured intersection, which was closed to vehicular traffic, to film an officer arresting NBC cameraman Bruce Bernstein on April 22, 2000 during the Elian Gonzalez saga. Mr. Durruthy did so in the same exact manner he employed under police supervision, and with express police approval, during the preceding four (4)

months. The intersection was closed to vehicular traffic, and there were no acts of civil disobedience occurring in the intersection; there were no protestors in the streets, no cars in the street, and the police were *not* trying to clear the street/ intersection on which Mr. Durruthy was filming. According to Respondent Officer Pastor, the police were not concerned with acts of civil disobedience within the intersection where she arrested Mr. Durruthy.

When another officer instructed Mr. Durruthy to return to the sidewalk, Mr. Durruthy complied by immediately moving backwards away from the police officer and towards the curb. Pastor and Raul Martinez, the Chief of Police, also agree that Mr. Durruthy moved backward when instructed to do so by the officer. Nevertheless, Pastor, who was standing in a line of police officers approximately 60 feet away, rushed towards Mr. Durruthy to initiate his arrest.

Pastor admits that although she identified Mr. Durruthy as a member of the press and saw that Mr. Durruthy was carrying a large television camera, she did not extend him any special courtesies. Instead, Pastor violently pinned Mr. Durruthy to the ground and forcibly secured him by wrenching his right arm behind his back. Despite Mr. Durruthy's obvious intentions to cooperate, complete lack of resistance and prior working relationship with the police, Pastor and the other officers continued to forcefully pin him to the ground and wrench his bad arm behind his back. Mr. Durruthy was held in a police van for six hours and then released.

In unlawfully arresting Durruthy, Pastor violated the following City of Miami policy:

> [N]O WARRANTLESS ARREST OF MEDIA PERSONNEL FOR NON-FELONIES ACTS ARISING OUT OF THE PURSUIT OF THE NEWS GATHERING FUNCTION WILL BE MADE WITHOUT THE EXPRESS AUTHORITY OF THE SENIOR ON-DUTY COMMANDING OFFICER OR THE STAFF DUTY OFFICER.

(as in original). Chief Martinez explained the department's media policy as follows: (a) members of the media are granted a higher degree of courtesy than the average citizen, (b) the City's policy is to ask a member of the media to move to another area if they are in an area that would compromise a crime scene or impede the officer's ability to do her job and (c) if the member of the media complies with the officer's request to move, that is the end of the incident. Pastor admits that she did not extend any special courtesies to Mr. Durruthy, and did not obtain the express authority of any senior on-duty commanding officer to arrest Mr. Durruthy.

Pastor filed a motion for summary judgment based on qualified immunity. The District Court agreed with Durruthy and denied Pastor's motion. However, on appeal the Eleventh Circuit, over the dissent of Judge Stahl, disagreed and reversed.

REASONS FOR GRANTING THE PETITION

Review is imperative because the questions presented herein impact fundamental constitutional rights, as well as essential limitations on qualified immunity and federal jurisdiction. Moreover, the reasoning and conclusions reached by the Circuit Court are not only a distant departure from the accepted and usual course of judicial proceedings, they are in direct conflict with this Court's prior rulings in *Hope v. Pelzer*, 536 U.S. 730 (2002) and *Johnson v. Jones*, 115 S. Ct. 2151 (1995).

I. THE ELEVENTH CIRCUIT FAILED TO FOLLOW *HOPE v. PELZER*, 536 U.S. 730 (2002).

Despite this Court's admonishment in *Hope*, the Eleventh Circuit once again applied an unduly "rigid gloss" in analyzing whether Respondent Pastor violated a clearly established right of which a reasonable person would have known. The majority held that the only way to show that a clearly established right was violated is by "pointing to materially similar case that has already decided that what the police officer was doing was unlawful" or, in the absence of case law, "when the words of the pertinent federal statute or federal constitution provision . . . [are] specific enough to establish clearly the law applicable to particular conduct and circumstances to overcome qualified immunity." *Durruthy*, 351 F.3d 1080. The actual standard, as set forth by the Supreme Court in *Hope* and *Lanier*, is not so limited.

In *Hope*, this court overruled the Eleventh Circuit's ruling on a summary judgment order, based on a finding of qualified immunity, where the Circuit Court applied the incorrect analysis in evaluating the second prong of the

Saucier test. The second prong of the *Saucier* test requires a court to assess, if a constitutional right has been violated, whether that right is clearly established. The *Hope* opinion clarified that "[f]or a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope,* 536 U.S. 730 at 739 (internal quotation and citation omitted).

This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Hope,* 536 U.S. 730 at 739. The proper analysis a court ought to undertake in assessing whether the right was clearly established is whether the state of the law at the time of the incident would have given the official fair warning that the behavior was unconstitutional. *Id.* at 741. Accordingly, "officials can still be on notice that their conduct violates establishes law even in novel factual circumstances." *Id.*

A. Mr. Durruthy's right to not be improperly arrested, under the facts and circumstances in this case, was clearly established.

While the "words of the pertinent federal statute or federal constitutional provision *in some cases*" (*Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) (emphasis added) may show a clearly established right, and in other cases "a very high degree of prior factual particularity may be necessary" (*Hope* at 741), the analysis does not end there. The *Hope* Court explained that "[] general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even

though the very action in question has [not] previously been held unlawful." *Hope* at 740. (internal citations and quotations omitted). Accordingly, "officials can still be on notice that their conduct violates established law even in novel factual circumstances" (*id.* at 741) where the general state of law provides "fair warning" that her acts were unconstitutional. *Id.*; *Holmes*, 321 F.3d at 1078.

This case, unlike *Hope* and other cases calling into question the validity of an arrest, offers a video tape of the arrest. The video shows that Pastor's conduct was obviously illegal, even absent similar case law. No reasonable police officer could have concluded that probable or arguable probable cause could have existed to arrest an obvious member of the press engaged in news gathering in a cleared and secured intersection that was barricaded on all corners to prohibit vehicular traffic. As concluded by the District Court below,

> [w]hen an obvious member of the media approaches a police officer in a cleared street, is instructed to return to the sidewalk, and complies with the instruction, a police officer should be aware that a custodial arrest based on interference with a police officer is illegal. After Plaintiff began complying with the officer's instruction, the only conduct that Pastor could base the arrest on was the fact that Plaintiff continued to film and walked away slowly. Pastor did not need specific case law to give fair warning that an arrest in these circumstances could violate Plaintiff's Fourth Amendment rights.

Durruthy, 235 F. Supp.2d 1291 at 1298. Tellingly, as demonstrated on the video, of the countless police officers at the scene, it was only Pastor who initiated the arrest and who likewise ignored the fair warning that such arrest was unlawful.

Furthermore, the City of Miami has an established policy against warrantless arrests of media members. This policy alone, or in conjunction with the totality of the circumstances, demonstrates that Pastor knew her conduct was unlawful. The policy prohibits such arrests absent the express permission of a superior officer, grants a higher degree of courtesy to the press than ordinary citizens, and mandates if a journalist complies with the officer's request to move, that is the end of the incident. *See* CITY OF MIAMI'S OFFICE BULLETIN #00-4 dated January 14, 2000. Pastor twice violated this policy by initiating Durruthy's arrest without permission from a commanding officer and initiating the arrest notwithstanding Durruthy's immediate compliance with the officer's request to return to the sidewalk.

In *Hope,* the existence of a law enforcement guideline played a role in ascertaining whether the legal right at issue in that case was clearly established. In the case at bar the majority refused to acknowledge the similarity between *Hope* and the instant case. In the absence of factually similar case law, it is evident that the instant case presents a novel set of factual circumstances. However, the majority failed to recognize that, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope* at 741.

Petitioner concedes that the existence of a City of Miami guideline "does not convert an illegal act into a suddenly

legal one." However, as noted by Judge Stahl, the guideline does militate in favor of denying qualified immunity to Pastor at the summary judgment stage. Pastor was charged with knowledge of the guideline and recognized Durruthy as a member of the media. Had the Eleventh Circuit abided by *Hope*, the court would have found that Durruthy's rights were clearly established, and clearly violated.

The ruling in this case evidences that the Eleventh Circuit failed to heed this Court's warning in *Hope* and continues to favor qualified immunity over enforcement of constitutional rights by requiring plaintiffs, asserting various constitutional violations, to meet a near impossible burden. As Judge Stahl noted, to uphold the Eleventh Circuit's ruling "sets the bar prohibitively high and tips the balance contemplated by qualified immunity away from the Constitution." *Durruthy*, 351 F.3d 1080 at 1099.

B. Mr. Durruthy's right to not be subject to excessive force, under the totality of the circumstances, was clearly established.

Although the law does not afford journalists greater rights than the average citizen, the District Court correctly found that no reasonable officer would believe that the level of force used to arrest Mr. Durruthy was necessary under the circumstances. One cannot ignore that Durruthy was a cameraman engaged in newsgathering at the time of his arrest when performing a qualified immunity analysis. The Circuit Court, however, erred in failing to acknowledge this distinction.

Mr. Durruthy was exercising his first amendment rights in a cleared and secured street, with the express permission of the police. As described by the District Court below:

> Plaintiff was a member of the media who was arrested in the street during a protest. As he approached the police officer in the street, carrying his camera, it would have been clear to anyone that he was a journalist. Obviously he was not a danger to the police officers or anyone else. He himself was not even protesting—he was merely filming another cameraman's arrest. It appears from the videotape that he was arrested because he continued to film as he walked back to the sidewalk. Thus, the only danger facing Pastor and the other police officers was to their reputation on account of Plaintiff's footage.

Durruthy, 235 F. Supp 2d 1291 at 1300; *see also Thornton v. City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998) (per curium) (where the arrestee is not suspected of committing a serious crime, did not pose an immediate threat to anyone, and did not resist arrest, no force is required "and a reasonable officer thus would have recognized that the force used was excessive.").

The degree of forced used here was excessive for two separate and independent reasons. First, a reasonable officer could not have concluded that the physical force used by Pastor was necessary. Given Mr. Durruthy's status as a journalist engaged in newsgathering, that he complied with the officer's instructions and was not a threat to anyone, and that there were no riot activities or cars within the cleared and secured intersection, Pastor clearly applied excessive

force by forcing him to the ground, holding him down by kneeling in his back, and wrenching his arms behind him.

Second, there is no evidence that Pastor, or any other officer, made any threat of physical coercion, or even a simple request, that Mr. Durruthy submit to an arrest.

To conclude that a defendant officer arrested the plaintiff with excessive force, the court must evaluate "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Conner*, 490 U.S. 386, 396 (1989). "[T]he force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force, which is measured by the severity of the crime, the danger to the officer, and the risk of flight." *Lee,* 284 F.3d at 1198.

Mr. Durruthy was exercising his constitutional rights as a member of the press in a manner expressly approved by the City of Miami. Assuming *arguendo* he committed any crime, it was a de minimus crime at best. Further, Pastor and her Chief of Police conceded that Mr. Durruthy was not a threat to any private persons. Also, Pastor conceded that Mr. Durruthy was not attempting to flee. Chief Martinez acknowledged that Mr. Durruthy cooperated with Defendant Pastor by putting down his camera and kneeling on one knee. At a minimum, within the confines of summary judgment, Pastor's conduct cannot be deemed "not obviously unreasonable" such as to warrant a grant of qualified immunity. *Smith v. Mattox,* 127 F.3d 1416, 1420 (11th Cir. 1997).

As the video of the arrest makes clear, Mr. Durruthy was not a threat to any police officers. He did not in any way resist arrest. As a result, the force used was clearly excessive and grossly disproportionate to what the circumstances required.

There was simply no reason for a member of the press to be gang tackled by Pastor and her fellow officers, pinned down and hand-cuffed behind the back in the face of pleas to cooperate and the inability of his shoulder to move backward for cuffing. Accordingly, whether based on this case's unique facts, the police department guideline and/or the general state of the law, Pastor had fair warning that her acts were unconstitutional.

At a minimum, this evidence provides a material dispute of fact that precludes the entry of summary judgment. Thus, the Eleventh Circuit's reversal of the District Court could only be based on its failure to follow *Hope*.

II. THE ELEVENTH CIRCUIT EXCEEDED ITS JURISDICTIONAL LIMITATIONS.

The Eleventh Circuit overstepped its jurisdictional limitations by reviewing the factual sufficiency of the evidence after the district court made specific factual findings in denying the motion for summary judgment. Federal appellate courts review summary judgment rulings de novo under the following standard:

> In conducting de novo review of the district court's disposition of a summary judgment motion based on qualified immunity, we are required to resolve all issues of material fact in favor of the

> plaintiff. *See, e.g., Sheth v. Webster*, 145 F. 2d 1231, 1236 (11th Cir. 1998). "We then answer the legal question of whether the defendant[ ][is] entitled to qualified immunity under that version of the facts." *Thornton v. City of Macon*, 132 F.3d 1395, 1397 (11th Cir. 1998). Indeed, we approach the facts from the plaintiff's perspective because "[t]he issues appealed here concern 'not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of clearly established law.'" *Sheth*, 145 F.3d 1236 (quoting *Johnson v. Jones*, 515 U.S. 304, 311, 115 S. Ct. 2151, 2155, 132 L. Ed. 2d 238 (1995)). As this Court has repeatedly stressed, the "facts, as accepted at the summary judgment stage of the proceedings, may not be the actual facts of the case." *Priester v. City of Riviera Beach*, 208 F. 3d 919, 925, n.3 (11th Cir. 2000). Nevertheless, for summary judgment purposes, our analysis must begin with a description of the facts in the light most favorable to the plaintiff. *See Skritch v. Thornton*, 280 F.3d 1295, 1299 (11th Cir. 2002)

Lee, 284 F.3d 1188. A defendant's motion for summary judgment is an appealable collateral order only where "(1) the defendant was a public official asserting a defense of "qualified immunity," and (2) the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of "clearly established" law." *Johnson v. Jones*, 115 S. Ct. 2151 (1995).

Significantly, *Johnson* clarified that the "portion of a district court's summary judgment order that, though entered in a "qualified immunity" case, determines only a question of "evidence sufficiency," . . . is not appealable." *Id.* at 2156. Thus, the Circuit Court was not authorized to reevaluate the sufficiency of the evidence at this stage of the proceedings. Despite this limitation, the majority improperly reviewed and discounted material facts, and ignored other material facts, to support its reversal of the District Court.

For example, the majority acknowledged that the intersection Mr. Durruthy was in was cleared and that he entered the intersection with the express permission of the police. However, the majority did not accept those facts. Instead, the majority proceeded to review the factual sufficiency of, and weigh, these facts, which led the majority to later describe the scene as a "busy intersection at a chaotic time." *Durruthy*, 351 F.3d 1080 at 1092.

Further, Mr. Durruthy alleged he had been filming the Elian saga, with the express permission of the police, in the same manner as he was on the day in question for four months preceding his arrest. The Circuit Court was bound to accept these allegations as true and consider them in the light most favorable to Mr. Durruthy at this stage of the proceedings. However, the Circuit Court improperly discounted and distorted the importance of this permission and Durruthy's previous course of conduct, and summarized these allegations as: "[T]here is no evidence Durruthy had express permission to be in the street at the time and location of the arrest. His evidence of "permission" is vague, general, and states at the highest order of abstraction." *Id.* at 1091.

Moreover, it is axiomatic that in conducting a de novo review of any summary judgment motion, the Circuit Court is required to resolve all issues of material fact in favor of the plaintiff. *Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002). Here, the Circuit Court failed to properly resolve all issues of material fact in favor of Mr. Durruthy. As outlined above, there exists a clear factual dispute as to whether Durruthy was given permission to be in the street filming on the day of his arrest. Another factual dispute exists as to whether Durruthy's permission put Pastor on sufficient notice that the arrest was unjustified.

In short, the propriety of Mr. Durruthy's arrest hinges on the resolution of disputed material facts. Rather than consider these disputed material facts in the light most favorable to Mr. Durruthy, the majority incorrectly resolved them in favor of Pastor. As a result, the majority erred by failing to abide by the appropriate standard of review when faced with a summary judgment motion and, as a result, erred by concluding that Mr. Durruthy's arrest was justified.

Petitioner recognizes that factual disputes do not warrant the exercise of this high Court's jurisdiction. However, the Circuit Court's failure to follow the appropriate review of a summary judgment motion by examine the facts under the appropriate light, is of the utmost significance as it amounts to the court having overstepped its jurisdictional limitations. As such this violation necessitates review.

Pastor was not permitted to appeal the District Court's decision based on the sufficiency of the evidence. Such findings are not appealable interlocutory findings under *Johnson*, and thus the Circuit Court was not authorized to reevaluate the factual findings made by the District Court.

The language of the Circuit Court's opinion makes clear that the decision hinges upon new and improper findings resulting from a review of the facts in a light unfavorable to Mr. Durruthy. However, as found by the District Court, the material facts, when viewed in the light most favorable to Mr. Durruthy, support a denial of the summary judgment. As Judge Stahl described in his dissent:

> There were no acts of civil obedience taking place and no protestors or moving vehicles in the street. Moreover, the police were not clearing the area in which Durruthy was filming. Pastor herself was standing in a line of officers approximately sixty feet away from Durruthy. She left the line, without permission of any superior officer, and rushed over to Durruthy though she plainly saw that he was following another officer's direct order to "get off the street." She admitted that she was aware that Durruthy was a member of the press and saw that he was carrying a large television camera, but nonetheless helped pin him to the ground and forcibly secure him by wrenching his right arm behind his back and pressuring his head to the sidewalk. Through Durruthy repeatedly pled with Pastor and the other officers that he would go peacefully and that his "bad arm" would not bend backward, Pastor and the other officers did not relent.

Id. at 1095.

Similarly, Judge Stahl recognized, unlike the majority, that the alleged permission created a "genuine issue of material fact as to whether Pastor was aware, with notice

that Durruthy (and the media overall) was authorized to be in the street, that she was violating a clearly established federal right when she arrested him." In contrast, the majority not only failed to recognize the material issue of fact created by this allegation, but mistakenly chose to characterize the permission as "vague, general, and stated with the highest order of abstraction."

The Eleventh Circuit's improper reevaluation of the facts involved in this case are not only improper under the recognized rules of summary judgment, they amount to a violation of the Circuit Court's own jurisdictional limitations. For these reasons we implore this honorable Court to review this matter.

CONCLUSION

For the forgoing reasons, Petitioner respectfully requests that this Court grant review.

Respectfully submitted,

MARC A. WITES
WITES, KAPETAN & FRIEDLAND, P.A.
1701 West Hillsboro Boulevard
Suite 305
Deerfield Beach, FL 33441
(954) 570-8989

Counsel for Petitioner